

MICHIGAN SUPREME COURT

PUBLIC HEARING
January 23, 2008

ITEM 1 - 2006-06 - MCR 7.215 - Court of Appeals Conflict Cases

JUSTICE KELLY: We all remember you.

CHIEF JUSTICE TAYLOR: Good morning. Mr. Royster do you want to come up and talk to us about 2006.06?

MR. ROYSTER: Good morning your honors. Thank you for agreeing to convene just to hear me for three minutes. My name is Larry Royster; I'm the Research Director at the Michigan Court of Appeals. I'm also a member of the Court's court rule committee which discussed the amendments in this court rule at length, and ultimately presented it to the entire bench for a vote and that's how it has come to you. There are a couple of things on the amendment that I think are significant. One is the elimination of two references to the outcome determinative requirement - that the issue in the "but for" case be outcome determinative. And the second one adds language that indicates that we have to indicate the disposition in the case by the "but for" panel. My comments will be focused primarily on the elimination of the requirement for the outcome determinative factor because I think that maybe the more significant of the amendments. I imagine you're probably wondering why we even propose this because it is certainly not a disagreement with the apparent purpose of the court rule requirement - the outcome determinative - because certainly we don't want panels overreaching and trying to set up special panels just to overrule points of law that they perhaps disagree with. Those are really a lack of clear definition of what outcome determinative means that just by its two-word description it's fairly clear. What the problem is though is in the application of what means outcome determinative, whether that is understood to be directed at the specific issue or the case, and there are a few conflict cases I think kind of illustrate the confusion that the Court has. But essentially we have a disagreement among the twenty-eight judges when they're being polled on the outcome determinative question as to whether that means

outcome determinative to the issue, whether the "but for" panel would have decided that specific issue differently "but for" the prior holding, or whether it means there is a different result as a result of the prior case. One case that illustrates that is *Health Call of Detroit*. That had to do with whether you could collect more than nominal damages in an at-will employment situation for a wrongful determination. The seminal case, the prior case, was *Environair v Steelcase*, and that held no, you were limited to nominal damages. *Health Call of Detroit* looked at that and said we disagree with the holding. In this situation, there was some special damages that perhaps could have been collected if the proofs were allowed, but it was summary dispositioned out and we never reached that point. It was certified to be a conflict, twenty-eight judges felt it was outcome determinative, or at least a majority of them as presented to the special panel of judges, and there they had a little problem on deciding exactly what that meant - issue versus case specific - or outcome specific -

JUSTICE CORRIGAN: Mr. Royster?

MR. ROYSTER: Yes.

JUSTICE CORRIGAN: Why wouldn't it make some sense to try to define outcome determinative better rather than totally eliminating the requirement?

MR. ROYSTER: We tried that in a couple of different attempts at defining that, and -

JUSTICE CORRIGAN: You tried it within the rules committee?

MR. ROYSTER: Within the rules committee. Ultimately we threw up our hands thinking that either it was too confusing to understand or you made things so specific that it was difficult to apply. And also I'm not sure - it actually resolves all the problems that could arise as well - again going back to this *Health Call* panel. One of the things that they looked at - or they were cautious about was treading on the sanctity of the conflict - the special conflict order. And in saying that what they meant was we have twenty-eight judges - a majority of twenty-eight judges certified as is conflict, but when they looked at it they essentially felt that this case could have been distinguished and, therefore, there was really no conflict.

But if they were to hold that in that case, then you essentially have a disagreement with the majority of the bench saying that there was a conflict or it said it should have been certified. And that could play havoc ultimately with the parties. I'm not sure how it would play if a "but for" panel has a certain holding and one party loses, the conflict is certified and goes to a special panel of judges and they say there was really no conflict here because either the second panel misunderstood the holding of the first case, or it could have been distinguished on the facts, therefore there is no outcome determinative question. And they resolve it for - say that the other side -

JUSTICE YOUNG: But why aren't they bound by the determination of the whole bench on that question?

MR. ROYSTER: The bench looks at that, but they're not looking at the record either. And I think until you delve into the record it may not be apparent given the facts that this cannot be distinguished.

JUSTICE CAVANAGH: Is it problematic polling the entire bench?

MR. ROYSTER: It's problematic to the extent that the bench has different definitions as to what outcome determinative means so you have a handful of judges thinking its issue specific, that if this panel said it was bound by the prior decision then, therefore, it is, and so we're gonna grant that. Others say no, this case - ultimately the same disposition resulted so the case is not outcome determinative and, therefore, we're not gonna certify the conflict.

JUSTICE CAVANAGH: Has the entire Court considered this proposal? Have they expressed any view -

MR. ROYSTER: It was taken to the bench as a whole, and they voted to proceed with the amendments. There was, of course, some dissent, but the majority of the judges voted to send this forth.

JUSTICE CAVANAGH: Okay.

CHIEF JUSTICE TAYLOR: How many - You said there's a handful of judges. How many think this is issue determinative if you know?

MR. ROYSTER: To be honest, I couldn't hazard a guess. They are polled and they indicate how they vote up or down.

CHIEF JUSTICE TAYLOR: No, I'm just curious. Is it most people on the Court feel it's outcome determinative in the sense that the case turned out different, and some feel it's just an issue that is determinative?

MR. ROYSTER: I think the majority would define outcome determinative as to the case, -

CHIEF JUSTICE TAYLOR: Okay.

MR. ROYSTER: and there's a large number by the minority.

JUSTICE YOUNG: A portion of them felt that the case was determinative of the outcome in that case.

MR. ROYSTER: Right, right. The result has changed as a result of having been bound by that prior decision. But back to the point that you had asked about whether we could define this more clearly, and again we had made attempts and ultimately said it's working against us. If that -

JUSTICE CORRIGAN: But that would be a possibility of putting the conflicting definitions in writing and forwarding them up to the Supreme Court and letting us look at it in the course of our administrative responsibilities.

MR. ROYSTER: Absolutely, we could do that.

JUSTICE CORRIGAN: Okay.

MR. ROYSTER: The hazard that may still present itself though is if you get this special panel convening and ultimately deciding this was not outcome determinative and then going forth and ruling on the merits of the issue, the losing party may then come forward and say wait a minute, we should never have had a special panel convene because one of the requirements is that they sit only on outcome determinative questions. We lost at the special panel level even though we prevailed at the "but for" level.

JUSTICE CORRIGAN: Has that theoretical possibility actually emerged in a case?

MR. ROYSTER: Not that I'm aware of.

JUSTICE CORRIGAN: All right.

MR. ROYSTER: No, it could have emerged in the *Health Call of Detroit* case, but did not. There was no subsequent appeal to this Court that I'm aware of.

JUSTICE CORRIGAN: Thank you.

CHIEF JUSTICE TAYLOR: Any further questions? Thank you very much Mr. Royster.